Office - Supreme Court
FILED
FEB 12 195
CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 583

RAY HOPTOWIT, JOHN DOE AND RICHARD ROE,
Petitioners,

v.

SEUFERT BROS. COMPANY, A CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

KENNETH R. L. SIMMONS,
MAURICE W. SEITZ,
221 Fratt Building,
Billings, Montana,
Attorneys for Petitioner.

INDEX

Subject Index

	Page
Petition for Writ of Certiorari	1
Jurisdiction	1
Summary Statement of the Matter Involved	2
Opinions Below	6
Questions Presented and Specification of Errors to be Urged	6
Reasons Relied on for the Allowance of the Writ	6
Appendix (Yakima Treaty of June 9, 1855, 12 Stat. 951)	12

Table of Authorities Cited

Alaska Pacific Fisheries v. *United States*, 39 S. Ct. 40, 248 U.S. 78, 63 L. Ed. 138	10
Choctaw Nation v. *United States*, 119 U.S. 1, 30 L. Ed. 306, 7 Sup. Ct. Rep. 75	7
Erie R. Co. v. *Hamilton, etc.*, 248 U.S. 369, 39 S. Ct. 95, 63 L. Ed. 307	1
Jones v. *Meehan*, 175 U.S. 1, 44 L. Ed. 49, 20 Sup. Ct. Rep. 1	7
Moore v. *United States* (C.C.A. 9th), 157 Fed. 2d 760	10
Seufert Bros. Company v. *United States*, 249 U.S. 194; 63 L. Ed. 555, 557, 558	3, 7, 8, 9, 10
Tulee v. *State of Washington*, 315 U.S. 681; 86 L. Ed. 1115	3, 7, 9
United States v. *Kagama*, 118 U.S. 375, 384; 30 L. Ed. 228, 231, 6 S. Ct. 1109	10
United States v. *Winans*, 198 U.S. 371; 49 L. Ed. 1089	3, 7, 9, 10
United States Code Annotated—Sections 237, 344(a) and (b)	1
Yakima Treaty of June 9, 1855 (12 Stat. 951), II Kappler, Indian Laws and Treaties 698	2, 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 583

RAY HOPTOWIT, JOHN DOE AND RICHARD ROE,
Petitioners,

v.

SEUFERT BROS. COMPANY, A CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

To the Honorable Fred M. Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended, being Sections 344 (a) and (b) of the United States Code Annotated. See *Erie R. Co.* v. *Hamilton, etc.*, 248 U. S. 369, 39 S. Ct. 95, 63 L. Ed. 307.

The judgment of the Supreme Court of the State of Oregon was filed and entered on November 14, 1951. The

time for seeking certiorari begins to run from the day the said judgment was entered. This petition is filed within three months after the entry of the judgment as required by Section 2101 of Title 28 of the United States Code Annotated.

Summary Statement of the Matter Involved

This is a suit in equity brought in the Circuit Court of the State of Oregon, Wasco County, Oregon, by Seufert Bros. Company, a corporation, respondents herein, to enjoin Ray Hoptowit, one of the petitioners herein, from crossing and re-crossing lands owned by respondents immediately adjacent to fishing locations of the Yakima Tribe of Indians for the purpose of buying and selling fish commercially.

The material defenses raised by the petitioner, Ray Hoptowit, in his Answer (R. 7) were that he is a member of the Yakima Tribe of Indians and entitled to all of the rights and privileges of members of the Yakima Tribe of Indians as guaranteed by the Yakima Treaty of June 9, 1855 (12 Stat. 951). (R. 12). Quoting from paragraph C of his Answer (R. 9):

> "That under the aforesaid provisions of said treaty of June 9, 1855 there was reserved to the Yakima Tribe of Indians and to its members in perpetuity a right to take fish at all usual and accustomed places and in addition thereto an easement to enter upon lands adjacent to these usual and accustomed places for the purpose of taking fish, bartering for, trading, buying and selling fish at said usual and accustomed places and an easement to cross said lands for the purpose of leaving said usual and accustomed places and in further addition thereto, an easement upon said fishing locations to fish at said usual and accustomed places without encroachment or interference in their activities by any agency or person exclusive of members of the Yakima Tribe of Indians."

The pertinent provisions of the Yakima Treaty of June 9, 1855 are contained in Article 3 thereof, as follows:

> "The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

The Seufert Bros. Company, the plaintiff in the trial court, contended that under the Yakima treaty of June 9, 1855 the sole right guaranteed to members of the Yakima Tribe was the right to fish and such rights as might be attendant to the right to fish, but when members of the Tribe entered the field of commerce, became fish buyers, this right was not in existence at the time the treaty was made and cannot be impliedly written into the treaty. In other words, that where the treaty was silent and did not specifically list this right it cannot be inferred from the language of the treaty (R. 22).

The contention of the defendant (R. 23-28) was that the circumstances leading up to, surrounding and following the Yakima Treaty of June 9, 1855, definitely controlled the interpretation to be made by the court of the provisions of the Yakima treaty; that the treaty must be interpreted liberally and in line with the following decisions of this court where this identical treaty was construed:

United States v. *Winans*, 198 U. S. 371; 49 L. Ed. 1089;
Seufert Bros. Company v. *United States*, 249 U. S. 194; 63 L. Ed. 555;
Tulee v. *State of Washington*, 315 U. S. 681; 86 L. Ed. 1115.

A stipulation was entered into between the parties during the trial of the case (R. 30-45) containing admissions that the lands adjacent to the fishing locations of the Yakima Tribe in the Columbia River were owned by the Seufert Bros. Company; that these lands were crossed by the defendant, Ray Hoptowit, a member of the Yakima Tribe of Indians, without the permission of the plaintiff, for the purpose of buying and selling fish commercially taken at the usual and accustomed fishing places of the Yakima Tribe.

The stipulation also provided for the admission in evidence as defendant's Exhibit No. 1 (R. 80) a certified photostatic copy of the Record of the Official Proceedings at the Council held at Walla-Walla Valley between Governor Isaac I. Stevens and other agents of the United States and Chiefs and Headmen of the Yakima, Umatilla and other tribes of Indians leading up to the Yakima Treaty of June 9, 1855 (12 Stat. 951) from May 22, 1855 to June 11, 1855, duly certified by Solon J. Buck, Archivist of the United States on May 4, 1948. It was also stipulated that the court could take judicial notice of certain excerpts from standard historical works and public documents based upon reliable source material, setting forth the historical background of the barter and trade of the Indian inhabitants of the Columbia Basin before, at the time of, and following the Yakima Treaty of June 9, 1855 (R. 35-45).

The trial court took judicial notice of these excerpts (R. 37) from historical works and public documents and gave considerable weight to them in arriving at its decision (R. 59).

The trial or the Circuit Court of the State of Oregon, Wasco County, Oregon on September 18, 1950 entered its Opinion on the Merits (R. 52) ordering that plaintiff's complaint be dismissed, liberally interpreting the Yakima Treaty. The Court, after reviewing at length the circum-

stances leading up to, and following the treaty, concluded that the Yakima Tribe had used the fish caught at its usual and accustomed fishing places in barter and trade since time immemorial and that this right was incident to and part of the fishing rights guaranteed to the Yakima Tribe by the treaty of June 9, 1855. The Court stated (R. 61):

> "The evidence is conclusive that prior to the making of the treaty, and at all times since, the Indians have been in the habit of using their catch in commerce. Considering the vast numbers of fish caught and their great weight, of course it would be absurd to think or say that any one Indian would be required to catch only a sufficient amount of fish for his own consumption. Obviously, the tribe used the take in barter and trade, probably from time immemorial. Undoubtedly, as brought out in some of these excerpts, fish were traded by these Indians for the produce of other tribes, which produce was brought from great distances; and it is entirely probable that a dozen Indians might catch enough fish for the consumption of the entire tribe for a year, and a great number of Indians fishing would require that the take be sold, or wasted. Hence it follows from the customs of the tribes and from the manner in which the take was disposed of, that the Indians have always used the fish commercially."

An appeal was taken by Seufert Bros. Company to the Supreme Court of the State of Oregon (R. 13) which reversed the decree of the trial court, entering judgment accordingly on November 14, 1951 (R. 71) and remanded and reversed the decree of the lower court, (R. 72), basing its conclusion upon a narrow interpretation of the Yakima treaty, holding that the right of trade and barter was limited to members of the Yakima Tribe who actually caught fish at the usual and accustomed places of the Yakima Tribe (R. 65, 70).

For the reasons that a federal question is involved decisive of this cause and further because the applicable deci-

sions of this Court are not in accord with this decision of the Supreme Court of the State of Oregon, petitioner now makes application for this writ.

Opinions Below

The Circuit Court of the State of Oregon, Wasco County, Oregon, entered its Opinion on the Merits which is found in the record at page 52. The opinion of the Supreme Court of the State of Oregon is not yet reported but is found in the record at page 63.

Questions Presented and Specifications of Errors to Be Urged

Under the Yakima Treaty of June 9, 1855 (12 Stat. 951), and in particular Article 3 thereof (Appendix p. 13), was there reserved to the Yakima Tribe and its members the right of ingress and egress upon and across lands in private ownership adjacent to the usual and accustomed fishing places of the Yakima Tribe for the purpose of buying and selling fish commercially caught at the usual and accustomed fishing places?

The Yakima Tribe and its members, under the Yakima Treaty of June 9, 1855 (12 Stat. 951), have the right of ingress and egress upon lands adjacent to their usual and accustomed fishing places for the purpose of bartering for, trading, buying and selling fish taken at said places.

The Supreme Court of the State of Oregon erred in construing the Yakima Treaty in the very narrowest terms and in denying the Yakima Tribe and its members this right.

Reasons Relied On for the Allowance of the Writ

1. This decision of the Supreme Court of the State of Oregon, reached entirely by its construction of the Yakima Treaty of June 9, 1855 (12 Stat. 951), which was decisive

of the case, is not in accord with the decisions of this Court in the following cases:

United States v. *Winans,* 198 U. S. 371; 49 L. Ed. 1089;
Seufert Bros. Company v. *United States,* 249 U. S. 194; 63 L. Ed. 555;
Tulee v. *State of Washington,* 315 U. S. 681; 86 L. Ed. 1115.

In the *Winans* case this Court interpreted the Yakima Treaty of June 9, 1855, as not only granting members of the Yakima Tribe a preferred right to fish at the usual and accustomed places in the Columbia River but also a right of ingress and egress upon and across lands in private ownership immediately adjacent to the fishing locations. This Court stated (49 L. Ed. at page 1094):

> " 'And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise and inequality "by the superior justice which looks only to the substance of the right, without regard to technical rules." (Choctaw Nation v. United States) 119 U. S. 1, 30 L. Ed. 306, 7 Sup. Ct. Rep. 75; Jones v. Meehan, 175 U. S. 1, 44 L. Ed. 49, 20 Sup. Ct. Rep. 1. How the treaty in question was understood may be gathered from the circumstances.
>
> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not

granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein . . . "

In the Seufert Bros. case this Court held that the Yakima Indians under their treaty had the right to fish on the north as well as the south shore of the river and across lands adjacent to locations on either side of the river. At the outset of its opinion this Court stated (63 L. Ed. 557):

> "The appeal requires the construction of the language quoted . . . (the right of taking fish at all usual and accustomed places) . . . and the circumstances incident to the making of the treaty are important."

The the evidence found by the lower court, as to the habits and customs of the Indians at the time of the treaty was received, and this Court said at page 558 of 63 L. Ed:

> "The district court found, on what was sufficient evidence, that the Indians living on each side of the river, ever since the treaty was negotiated, had been accustomed to cross to the other side to fish. . . . The record also shows . . . that the Yakima Indians were accustomed to resort habitually to the locations described in the decree for the purposes of fishing at the time the treaty was entered into, and that they continued to do so to the time of the taking of the evidence in the case. . . .
>
> How the Indians understood this proviso we are considering cannot be doubtful. During all the years since the treaty was signed they have been accustomed habitually to resort for fishing to the places to which the decree of the lower court applies . . . This shows clearly that their understanding of the treaty was that

they had the right to resort to these fishing grounds . . . and this is the extent of the right that is secured to them by the decree we are asked to revise. . . .

To restrain the Yakima Indians to fishing on the north side and shore of the river would greatly restrict the comprehensive language of the treaty . . . and would substitute for the natural meaning of the expression used—for the meaning which it is proved the Indians, for more than fifty years derived from it—the artificial meaning which might be given to it by the law and by lawyers."

In the *Tulee* case this Court held that the exaction of license fees by the State of Washington as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" could not be reconciled with a fair construction of the Yakima Treaty. This Court in reviewing the almost identical evidence which is now before this Court, in particular, the minutes and proceedings and negotiations preceding the signing of the Yakima Treaty of June 9, 1855 (R. 80), at page 1120, 86 L. Ed. stated:

"In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 S. Ct. 662, this Court held that, despite the phrase "in common with citizens of the territory," Article 3 conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their "usual and accustomed places" in the ceded area; and in Seufert Bros. Co. v. United States, 249 U. S. 194, 63 L. Ed. 555, 39 S. Ct. 203, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance

with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. United States v. Kagama, 118 U. S. 375, 384; 30 L. Ed. 228, 231, 6 S. Ct. 1109; Seufert Bros. Co. v. United States, supra (249 U. S. 198, 199, 63 L. Ed. 558, 559, 39 S. Ct. 203.)"

This Court has always liberally interpreted the provisions of Indian treaties, giving special consideration to the circumstances surrounding each treaty under the rule announced in the case of *Alaska Pacific Fisheries* v. *United States,* 39 S. Ct. 40, 248 U. S. 78, 63 L. Ed. 138. Also see: *Moore* v. *United States* (C. C. A. 9th), 157 F. 2d 760. The Supreme Court of the State of Oregon in the instant case has disregarded entirely the circumstances leading up to and following the Yakima Treaty of June 9, 1855, and has interpreted the Yakima Treaty in its narrowest terms.

2. The Supreme Court of the State of Oregon in arriving at its decision gave the Yakima Treaty of June 9, 1855 the very narrowest construction and overlooked the controlling principle of law announced by this Court in the *Winans* case, that the Yakima Treaty "was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted" (49 L. Ed. 1092).

3. The Supreme Court of the State of Oregon has denied a member of the Yakima Tribe the right to buy and sell fish commercially caught by members of the Yakima Tribe at the usual and accustomed fishing places of the tribe, which is incidental to his fishing right at these locations as guaranteed by Article 3 of the Treaty of June 9, 1855. The Supreme Court of the State of Oregon has entirely overlooked the evidence of fishing activities of members of the Yakima Tribe before, at the time of, and after the treaty of June 9, 1855 as contained in excerpts from historical writings and public documents appearing in the record to

establish that from time immemorial these Indians have been in the habit of using their catch in commerce. The Supreme Court of the State of Oregon completely ignored the findings of the lower court in this respect (R. 69).

4. The Supreme Court of the State of Oregon has failed to consider the intent of the contracting parties to the Yakima treaty as clearly stated in the minutes taken at the Council Grounds preliminary to the execution of the Yakima treaty of June 9, 1855, to the effect that the Yakima Indians should be forever allowed to take salmon from the Columbia River without any restriction whatsoever save the rights of the sovereign to regulate in the interests of conservation.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of the State of Oregon commanding the said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Supreme Court of the State of Oregon in the case numbered and entitled on its docket Seufert Bros. Company, a corporation, Appellant *vs.* Ray Hoptowit, John Doe and Richard Roe, Respondents, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; that the judgment herein of the said Supreme Court of the State of Oregon be reversed and that the decision of the Circuit Court of the State of Oregon, Wasco County, Oregon, in said cause, be affirmed; and for such other and further relief as this Court may deem proper.

Dated this 3rd day of January, 1952.

KENNETH R. L. SIMMONS,
MAURICE W. SEITZ,
By KENNETH R. L. SIMMONS,
Attorneys for Petitioners,
221 Fratt Building,
Billings, Montana.

APPENDIX

TREATY WITH THE YAKIMA, 1855

June 9, 1855 (12 Stat. 951. Ratified Mar. 8, 1859. Proclaimed Apr. 18, 1859.)

Articles of agreement and convention made and concluded at the treaty-ground, Camp Stevens, Walla-Walla Valley, this ninth day of June in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian Affairs for the Territory of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

Article 1. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to-wit:

Commencing at Mount Rainier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes, (119° 10′,), which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47°) parallel of latitude; thence east on said

parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southeasterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "La Lac", thence southerly to a point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island", between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

Article 2. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries; to-wit: Commencing on the Yakima River, at the mouth of the Attah-nam River; thence westerly along the said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence, southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit

of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements, of an equal value shall be furnished him as aforesaid.

Article 3. And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and

berries, and pasturing their horses and cattle upon open and unclaimed land.

Article 4. In consideration of the above cession, the United States agrees to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: Sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: For the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year, and for the next five years, four thousand dollars per year.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

Article 5. The United States further agrees to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tinshop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two

blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one sawmill and one flouring-mill keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakima Nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

Article 6. The President may, from time to time, at his discretion, cause the whole or such portions of such reserva-

tion as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Article 7. The annuities of the aforesaid confederated tribles and bands of Indians shall not be taken to pay the debts of individuals.

Article 8. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agents for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Article 9. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

Article 10. And Provided, That there is also reserved and set apart from the lands ceded by this treaty, for the

use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam Fishery", which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

Article 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,
Governor and Superintendent (L.S.).

Kamaiakun, his x mark. (L.S.)
Skloom, his x mark. (L.S.)
Owhi, his x mark. (L.S.)
Te-cole-kun, his x mark. (L.S.)
La-hoom, his x mark. (L.S.)
Me-ni-nock, his x mark. (L.S.)
Elit Palmer, his x mark. (L.S.)
Wish-och-kmpits, his x mark. (L.S.)
Koo-lat-toose, his x mark. (L.S.)
Shee-ah-cotte, his x mark. (L.S.)
Tuck-quille, his x mark. (L.S.)
Ka-loo-as, his x mark. (L.S.)
Scha-noo-a, his x mark. (L.S.)
Sla-kish, his x mark. (L.S.)

Signed and sealed in the presence of James Doty, secretary of treaties; Mic. Cles, Pandosy, O.M.T.; Wm. C. McKay; W. H. Tappan, sub Indian agent, W.T.; C. Chirouse, O.M.T.; Patrick McKenzie, interpreter; A. D. Pamburn, interpreter; Joel Palmer, superintendent Indian affairs O.T.; W. D. Biglow; A. D. Pamburn, interpreter.

SUBJECT INDEX

	Page
Respondent's Statement of Facts	1
Argument on Petitioner's First Point	6
Argument on Petitioner's Second Point	14
Argument on Petitioner's Third and Fourth Points	17
Conclusion	22

TABLE OF AUTHORITIES CITED

Page

Choctaw Nation of Indians v. United States, 63 S. Ct. 672, 318 U. S. 423 15

Corpus Juris Secondum, Vol. 42, p. 683 and Vol. 36, p. 829, Sec. 1 ..... 9, 14

Irving's Astoria or Anecdotes of an Enterprise Beyond the Rocky Mountains—Auth. Rev. Ed.—1 Vol.—G. P. Putnam's Sons, page 150 21

Johnson v. Hoy, 151 Ore. 196, 47 Pac. 2d. 252 9

McCauley v. Makah Indian Tribe, 128 Fed. 2d. 867 10

Northwest Bands of Shoshone Indians v. United States, 65 S. Ct. 690, 699; 324 U. S. 335 15

Seufert Bros. Company v. United States, 249 U. S. 194, 63 Ed. 555 ..... 5, 11

Skeem, et al. v. United States, 273 Fed. 93, 95 16

State v. Tomich, 255 Pac. 122; 143 Wash. 364 10

Tulee v. State of Washington, 315 U. S. 681; 86 L. Ed. 1115 ..... 5, 12

United States v. Winans, 198 U. S. 371; 49 L. Ed. 1089 ..... 5, 7, 8

Winters v. United States, 207 U. S. 564; 52 L. Ed. 340 16

Yakima Treaty of June 9, 1855 (12 Stat. 951), II Kappler, Indian Laws and Treaties 798 ..... 3, 16

No. 583

In the Supreme Court of the United States

October Term, 1951

RAY HOPTOWIT, JOHN DOE and RICHARD ROE,

Petitioners,

v.

SEUFERT BROS. COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENT'S STATEMENT OF FACTS

Respondent, Seufert Bros. Company, commenced this litigation by filing a suit in the Circuit Court of the State of Oregon for Wasco County, in which suit the Respondent sought to restrain the Petitioner, Ray Hoptowit, from repeated trespasses upon the Respondent's land.

Respondent is the owner in fee simple of certain lands which border on the Columbia River on the south side. The lands commence about three miles East of The Dalles, Oregon and extend easterly for some distance. At various points along the river where the Respondent has acquired the shore land there are fishing holes and fishing places where, dur-

ing the fishing season, it has been the custom for the public to gather and fish. The fishermen are both white men and Indians, and some of the Indians are Indians with treaty rights. (R. 30). Some of the fishing holes or places are claimed to be old and accustomed fishing places of the Yakima Tribe of Indians. During the fishing season the Yakima Tribe of Indians fish there along with other members of the public. (R. 30).

The Respondent is a pioneer fish canning and processing concern and, by virtue of its ownership of the land, has enjoyed some advantage in the purchase of fish in competition with other buyers, for the reason that its ownership of the lands gives it easier access to the river than other buyers along the river, as other buyers must use the points of public access. (R. 32). The public, in gaining access to the fishing grounds, cannot trespass upon Respondent's property but must use the points of public access, excepting only that certain of the Indians who fish there by reason of early treaties made with the United States Government have the right of ingress and egress for such purpose over the property, a right which is not enjoyed by the public generally. This right of ingress and egress enjoyed by the Indians with treaty rights just mentioned grows out of treaties made with the Indians involved. (R. 92). Various tribes of Indians along the

river, as the original occupants of the property, ceded all of their right, title and interest in and to their territory along the river by various treaties, and among the tribes of Indians involved was the Yakima Tribe, of which tribe the Petitioner is a member.

The Yakima Treaty of 1855 and similar treaties with other tribes were made when the Government acquired the lands along the river, so that they might be opened up for settlement. The right of ingress and egress enjoyed by the Yakima Indians arose out of Article 3 of the Treaty of June 9, 1855, which article reads as follows:

> "The exclusive right of taking fish in all of the streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as is also the right of taking fish at all usual and accustomed places in common with the citizens of the territory, and erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." (12 Stat. 951) (R.77)

In construing this section of the treaty it was held by this Court, in United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 S. Ct. 662, that the Indians having reserved the right to fish at their old accustomed places, they also reserved the rights necessary to exercise the fishing right, which included the right of ingress and egress to the fishing grounds in the cus-

tomary manner—such access right being akin to an easement.

The Petitioner, Ray Hoptowit, a Yakima Indian, is engaged in business not as a fisherman but as a fish buyer and broker, competing with the Respondent in the purchase of fish. (R. 33). He purchases from the public generally, both Indians and white men. (R. 33). The right of the Petitioner to go over and across the Respondent's land for the purpose of fishing at all usual and accustomed places, where the Yakima Tribe of Indians were wont to fish, is not in controversy; nor is the right of the Petitioner to sell or trade the fish which he might catch himself at these usual and accustomed places, but the sole question is whether Article 3 of the treaty should be so construed as to vest in a member of the Yakima Tribe the right akin to an easement to go upon, across, and use the Respondent's lands, which he owns in fee simple, for the purpose of engaging in business as a commercial fish buyer and broker.

From a decree of the Circuit Court denying Respondent injunctive relief, the Respondent appealed to the Supreme Court of Oregon. The Supreme Court of Oregon, in ruling upon the matter, reversed the Circuit Court and authorized the injunction in accordance with the prayer of the complaint. In so ruling, the Oregon Supreme Court held:

"There is nothing in this treaty upon which the

> right of access to Respondent's lands for the purpose of carrying on the business of commercial fish buying may be based. The right to take fish in the streams; that is, "to fish" cannot form the basis for such an implied right of access because the right of fishing does not embrace the right to purchase and sell commercially." (R. 70)

It is this decision of the Oregon Supreme Court over which the Petitioner feels aggrieved and forms the basis of the Writ of Certiorari sought in this proceeding. The Petitioner's petition relies on four reasons or points for the allowance of the writ and, briefly summarized, these are as follows:

1. The decision of the Oregon Supreme Court is not in accord with decisions of this Court in the cases of:

> United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089;
> Seufert Bros. Company v. United States, 249 U. S. 194; 63 L. Ed. 555;
> Tulee v. State of Washington, 315 U. S. 681; 86 L. Ed. 1115.

2. The Supreme Court of Oregon, in arriving at its decision, gave the Yakima Treaty of June 9, 1855 the narrowest construction, and in construing the treaty overlooked the principle that the Yakima Treaty was not a grant of rights to the Indians but a grant of rights from them.

3. The Supreme Court of Oregon denied a member of the Yakima Tribe the right to buy and sell fish commercially caught by a member of the tribe at the usual and accustomed fishing places of the tribe, and in so

doing overlooked the evidence of fishing activities of members of the Yakima Tribe at the time of the execution of the treaty, to-wit, June 9, 1855.

4. The Oregon Supreme Court failed to consider the intent of the contracting parties, as shown in the minutes taken at the Council grounds preliminary to the execution of the treaty.

The Respondent, in this argument, will discuss each of the first and second points separately, and, since both the third and fourth points involved the evidence as to the intent of the contracting parties, will combine the argument on both of these points.

ARGUMENT ON PETITIONER'S FIRST POINT

With respect to the Petitioner's contention that the decision of the Oregon Supreme Court is not in accordance with the decisions of this Court in the cases of United States v. Winans, Seufert Bros. Company v. United States and Tulee v. State of Washington, it is submitted that the decision of the Oregon Supreme Court does not conflict with them.

In the case of United States v. Winans (cited supra), the defendant Winans was the holder of a patent from the State of Washington to certain shore lands on the Columbia River and, under permit from the State of Washington, had erected at old and accustomed fishing places of the Yakima Indians and other Indians devices for taking fish called "fish

wheels." The Government, in behalf of the Indians, brought suit to enjoin Winans from obstructing certain Indians of the Yakima Nation in the State of Washington from exercising fishing rights at such places. It was Winans' contention, apparently, that since he had purchased the shore lands and had a patent in fee from the government to adjoining property and had a permit from the State to operate the fish wheels, that the Indians would be trespassing upon his property if they attempted to fish at the place where he had his wheels. It was, of course, the Indians' contention that the existence of the wheels excluded them from fishing at their accustomed places. Winans further contended, according to the report, that the rights of the Indians existed only by virtue of the Treaty of 1855 (the same treay involved in this controversy) and that under Article 3 the only right reserved was the right of taking fish **in common with the citizens of the territory,** and since the only right reserved was to take fish in common with the citizens of the territory, the Indians had no other rights than those enjoyed by the public generally. In the case, the lower court dismissed the government's bill, but the United States Supreme Court reversed the lower court and, in construing Article 3 of the Treaty of 1855, stated:

* * * "There was an exclusive right of fishing re-

> served within certain boundaries. There was a right oustide of those boundaries reserved "in common with citizens of the territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—**the right to occupy it to the extent and for the purpose mentioned."** * * *

As a result of the Winans case, it was established that Indians who were members of the tribe that was a party to the Treaty of 1855 had a right in shore lands over and above those enjoyed by the public generally. The Court clearly stated its position when it said:

> "And surely it is within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as taking fish at all usual and accustomed places, nor does it restrain the State unreasonably, if at all, in the regulation of the right. **It only fixes in the land such easements as enable the right to be exercised."**

This case, seemingly, while it established easement rights of Indians, also limited the rights of the Indians, in that any easement must be such an easement as would enable the right to fish to be exercised. From this case it would clearly appear that where an Indian sought to exercise rights in the land which

were not necessary to accomplish the right to fish to be exercised, he would be a trespasser. We think it is significant in the Winans case that the lower court felt it would not be justified in issuing process to compel the defendants to permit the Indians to make a camping ground of their property while engaged in fishing. This ruling of the lower court was apparently not disturbed in the subsequent proceedings.

It would appear that in normal usage, the right to take fish is synonymous with the right to fish.

In 36 C.J.S., Fish, 829, Section 1, "fishing" is defined as follows:

> "To be employed **in taking fish** as by angling or drawing a net; a pursuit consisting, not of a single act, but of many acts, according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or of **taking them out of the water** and obtaining manual custody of them; it is a continuous process beginning from the time when the preliminary preparations are being made for **the taking of the fish** and extending down to the moment when they are finally reduced to actual and certain possession."

In state courts, where passed upon, the words "fishing" and "the taking of fish" have been treated as synonymous, viz: Johnson v. Hoy, 151 Ore. 196; 47 Pac. (2d) 252, the Court said:

> "We think this view places too narrow a construction upon the term "fishing." Such term is thus defined in 26 C. J. 594: "To be employed in

> taking fish as by angling or drawing a net; a pursuit consisting, not of a single but of many acts, according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or of taking them out of the water and obtaining manual custody of them; it is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession." We agree with appellants that picking up the net is a part of the fishing operation. **The last act is getting the fish into the boat."**

In the case of Seufert Bros. Company v. United States, (cited supra) this Court seems to have used the term "the right to fish" and "the right to take fish" interchangeably.

In State v. Tomich, 255 Pac. 122, 123; 143 Washington 364, it was held that alien cooks on fishing boats having no interest in the catch of fish and not actually engaged in handling of any gear or in actual taking of fish were held not to be punishable under the Washington statute prohibiting catching or taking of food fish by aliens, since they did not catch or take fish within the ordinary meaning of those words.

In lower courts, where passed upon, it has been held that the right to barter and sell fish is not within the terms of the treaty, viz: McCauley v. Makah Indian Tribe, 128 Fed. 2d. 867, the Court said:

> "The Makah treaty gave the same fishing rights as those of the Yakima treaty. * * *

> "The judgment also enjoins the appellants "from in any manner whatsoever interfering with or preventing the plaintiffs herein, or any of the members of the Makah Indian Tribe, from selling their fish caught and taken at said fishing place." Such an injunction is unwarranted for there is no allegation of the pleadings which mentions a threatened interference with regard to the sale of fish taken by the Makah tribe and the treaty is silent on the right of the Indians to dispose of the fish by sale or barter after they have been taken."

From the decisions to date, it would appear that the right reserved by these Indians on the property involved in this controversy is the right to fish at their accustomed locations, and that since, in this case, the petitioner is not a fisherman at all and desires to use the property of the Respondent as a place to carry on a business which is not fishing, it would appear that not only is the decision of the Oregon Supreme Court not in conflict with the United States v. Winans (cited supra), but that the Winans case itself clearly states that there are no easements in the land for any purpose other than to fish and, hence, no easement in the land to use it as a place to buy fish.

With respect to the case of the United States v. Seufert Bros. Company (cited supra), it is again difficult to see where the conflict exists. In this case, the government as the trustee for the Indians sought to restrain Seufert Bros. Company from interfering with Yakima Indians fishing on the south bank of the

Columbia River. The contention in this case on the part of Seufert Bros. Company was that the lands of the Yakima Indians were all north of the Columbia River and that, therefore, their rights did not extend beyond the middle of the stream and over on to the south bank of the Columbia River where the Seufert Bros. Company is located. This court, in this case, approved a restraining order prohibiting Seufert Bros. Company from interfering with the Yakima Indians when fishing at usual and accustomed places on the south bank of the Columbia River, the case simply established that the Yakima Indians under the Treaty of 1855 had reserved the right to fish at their ancient and accustomed places on the south bank of the Columbia River as well as the north bank. In this case, there was no activity involved but that of fishing and no other occupation involved. In view of that fact, it is difficult to see where this case would be in conflict with the decision of the Supreme Court when it held that buying and selling of fish as a broker was something different than fishing or taking fish.

The case of Tulee v. State of Washington (cited supra) was a case in which the State of Washington enacted a statute providing that it was unlawful to catch, take or fish for food fish with any appliance or by any means whatsoever, except with hook and lines, unless a license to do so was first procured, and pro-

vided a $5.00 fee for each dip bag net license for the taking of salmon on the Columbia River. Sampson Tulee refused to purchase a license and was convicted in the Superior Court for Klickitat County, Washington on a charge of catching salmon with a net without first having obtained a license as required by the state law. From the judgment of the Supreme Court of the State of Washington affirming the conviction, Tulee appealed to the Supreme Court of the United States and, in that decision, this Court held "that the State was without power to charge the Yakima a fee for fishing," notwithstanding the phrase "in common with citizens of the territory," contained in Article 3 of the Yakima Treaty. The Court stated that the exaction of a fee as a prerequisite to the enjoyment of fishing at their usual and accustomed places could not be reconciled with a fair construction of the treaty. In this case, the Court was concerned again with **actual fishing activity.**

In view of the fact that all three of the above mentioned cases dealt solely with fishing activity and construed Article 3 of the treaty with respect to such activities and, in view of the further fact, that the Supreme Court of the State of Oregon held that the brokerage business was not synonymous with fishing and that one takes fish in the stream by some method of fishing, not by purchase, it would appear that the

decision is in complete harmony with the above mentioned decisions of this Court. And, further, that under the limitations upon the type of easement granted, as laid down and defined in the Winans case, had the Supreme Court of Oregon ruled otherwise, the decision would not have been in accordance with the limitations set forth in the Winans case.

ARGUMENT ON PETITIONER'S SECOND POINT

As a second reason for the allowance of the Writ, the Petitioner suggests that the Supreme Court of Oregon, in arriving at its decision, gave the Yakima Treaty of June 9, 1855 the very narrowest construction and overlooked the principle that the treaty was not a grant of rights to the Indians but a grant of rights from them, to-wit, a reservation of those not granted. With respect to this contention, the opinion of the Oregon Supreme Court indicates that, while the Court recognized the rule that Indian treaties are to be liberally construed, they followed an equally **well-established rule that no right may be implied that does not have as its basis some express provision in the treaty itself.**

In 42 C.J.S. page 683, the text states:

> "The courts have power to construe treaties and agreements with Indians; the rule of liberal construction in favor of the Indians obtains, but the courts cannot disregard the obvious meaning of the terms used."

In Choctaw Nation of Indians v. United States, 63 S. Ct. 672, 678; 318 U. S. 423, this Court stated:

> "But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or achieve an asserted understanding of the parties."

And in Northwestern Bands of Shoshone Indians v. United States, 65 S. Ct. 690, 699; 324 U. S. 335, this Court stated:

> "All doubts," say petitioners, "must be resolved in their (the Indians') favor." Mr. Justice McLean, concurring in Worcester v. Georgia, 6 Pet. 515, at page 582, 8 L. Ed. 483, said, "The language used in treaties with the Indians should never be construed to their prejudice." But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress."

The Supreme Court of Oregon, in applying these rules, first found that the right to take fish and the right to fish were synonymous, and further found that the right to purchase and sell as a broker was not involved in the right to fish. Their conclusion, it would seem, is in accordance with well established principles of treaty construction.

As to the Petitioner's contention that there is sig-

nificance to the fact that the Yakima Treaty of 1855 was not a grant of rights to the Indians but a grant of rights from them, it is true that in some cases this principle has been given considerable weight, particularly in cases involving water rights for lands on Indian reservations in streams bordering upon or running through the reservation. (Skeem, et al. v. United States, 273 Fed. 93, 95; Winters v. United States, 207 U. S. 564; 52 L. Ed. 340.) But in this case, the Court is concerned not with the rights of Indians residing upon land, the full title of which has been wholly reserved, but is concerned with the rights of Indians off the reservation.

In Article 2 of the Yakima Treaty of 1855 there was reserved and set apart for the Indians certain therein described property; but other than the lands reserved and set apart in said article, the grant of the lands of the remaining territory of the Yakimas was absolute, viz:

> "Article 1. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish and convey to the United States all of their right, title and interest in and to the lands and country occupied and claimed by them and bounded and described as follows: * * * ." (12 Stat. 901) (R. 74)

The exception to the terms of this absolute grant, insofar as the rights of Indians off the reservation is concerned, would appear to be generally contained in Article 3 of the treaty; and by virtue of Article 3, off

the reservation there was reserved the right of taking fish at all usual and accustomed places. Therefore, in dealing with the right in property of the Indians off the reservation, it would appear that Article 3 defines and limits the rights of the Indians off the reservation, and it would seem that the right of Indians off the reservation can rise no higher than the express reservations therein contained.

ARGUMENT ON PETITIONER'S THIRD AND FOURTH POINTS

In the third and fourth points or reasons relied upon by the Petitioner he contends, briefly, that the Supreme Court of the State of Oregon denied a member of the Yakima Tribe the right to buy and sell fish commercially caught by members of the Yakima Tribe at the usual and accustomed places of the tribe, which is incidental to his fishing rights at these locations; and in so doing, has entirely overlooked the evidence of fishing activities of members of the Yakima Tribe at the time the treaty was executed; and, further, that the Oregon Supreme Court has failed to consider the intent of the contracting parties, as stated in the minutes taken at the Council grounds preliminary to execution of the treaty.

In respect to this contention, it appears that, in their opinion, the Oregon Supreme Court very carefully distinguished between the fisherman bartering

and selling his catch, and the Indian who was not a fisherman but was engaged solely as a broker buying and selling. (R.65). They did not deny the Indian fisherman the privilege of bartering or selling his catch in the customary manner. The Oregon Supreme Court did find that in the treaty negotiations, as shown by the minutes taken at the Council grounds preliminary to the execution of the same, that no suggestion was made of the right to purchase and sell fish commercially. And further found that there is a vast difference between fishing and purchasing fish. (R. 69). The Petitioner to the contrary notwithstanding, it would appear that the evidence in the case bears out this finding of the Oregon Supreme Court. The evidence submitted on behalf of the Petitioner in support of his contention that it was the intent of the contracting parties to contract with reference to the right of barter and sale consisted solely of:

(a) Defendant's Exhibit 1 (R. 80 and 34), which is a photostatic copy of the record of the official proceedings at the Council held in Walla Walla Valley between Governor Isaac I. Stevens, Gov. & Supt. W. T., and other agents of the United States, and chiefs and heads of the Yakima, Umatilla and other Tribes of Indians leading up to the execution of the Treaty of June 9, 1855. (12 Stat. 951);

(b) Statements quoted verbatim from historical books and documents. (R. 35-45).

A minute examination of the transcript of the proceedings which were had at the time of adoption of the treaty, does not disclose that there was ever under discussion a protective reservation for the purpose of barter and sale of fish; and, in fact, it was clearly stated by the government spokesman that the right reserved would be the right to leave the reservation and go to the usual fishing places and fish in common with the whites. (R. 115-117 Proceedings of June 5.)

In the negotiations leading up to the adoption of the treaty the references to fish or fishing, were of the following tenor:

June 2nd—Saturday

"General Palmer said * * * 'they say this land was not made for you alone, the air that we breathe, the water that we drink, was made for all. The fish that come up the rivers, and the beasts that roam through the forests and the plains, and the fowls of the air, were alike made for the white man and the red man.' (R. 103).

June 4th—Monday, 1855

"Gov. Stevens said: * * * 'there is plenty of salmon on these reservations, there are roots and berries.' * * * *" (R. 114).

June 5th—Tuesday

"Governor Stevens said: * * * 'This is a large reservation. The best fisheries on the Snake Riv-

er are on it; there are the fisheries on the Grande Ronde river. There are fisheries on the Os-ker-wa-wee, and the other streams. There are cumash grounds here at this place (pointing to the large cumash grounds of the Nes Perces). We feel if we put you on this Reservation our agent can visit you all and take care of you all.' (R. 116).

* * * "You will be allowed to pasture your animals on land not claimed or occupied by settlers; white men. You will be allowed to go on the roads, to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation." (R. 117).

* * * "They take Salmon and catch whale and make oil. * * * " (R. 117).

June 7th—Thursday

"The Young Chief said: * * * 'The Salmon comes up the stream—that is all' * * * ." (R. 135).

"General Palmer said: * * * 'You will be allowed to go and catch fish and dig roots the same as the whites.' * * * " (R. 137).

"Pee-Pee-Mox-Mox said: * * * 'I said to Gen. Palmer that I desired permission to get fish there while I lived.' * * *" (R. 138).

"General Palmer said: * * * 'That we have agreed that Pee-Pee-Mox-Mox shall have the privilege of building a house at the mouth of the Yakima and catching fish for five years.' * * *" (R. 138).

June 9th—Saturday

"Gov. Stevens said: "* * * 'They have their res-

ervation and fishing stations which they well know and which I understand is satisfactory.' * * * " (R. 141).

"* * * 'You will not be called according to the paper to move on the Reservation for two or three years; then is secured to you your right to fish' * * *" (R. 142).

"Gov. Stevens: * * * 'that he can catch fish at any of the fishing stations' * * *" (R. 145).

From an examination of the proceedings it would seem that the Oregon Supreme Court had a sound basis for its finding that the parties had in mind a right to fish, no more, no less.

With respect to the historical references, it is submitted that they tend to establish only that the Indians engaged in the primitive form of barter common to uncivilized people from very earliest times. With respect to the practice of acting as a middleman or an independent fish buyer and seller in the commercial sense, the record noted only one reference to this particular occupation, and that is found in Washington Irving's Astoria or Anecdotes of an Enterprise Beyond the Rocky Mountains—Author's Revised Edition—1 Vol.—G. P. Putnam's Sons, page 150 (R. 36-37). The author, dealing with this particular phase of the matter, stated as follows:

"For like reason we would make special mention of the village at Wishram, at the head of the long narrows, as being **a solitary instance of an aboriginal trading mart or emporium.**"

This reference, it would seem, specifically notes that the trading mart referred to was a solitary instance, and supports the Respondent's claim that it was not the general practice of Indians to act as middlemen and factors. There is no evidence in the record as to what tribe participated in the operation of the emporium at Wishram, and there is absolutely no evidence that such emporiums were the general practice.

In any event, irrespective of the evidence with respect to the habits and customs of the Indians on this point, there was no provision in the treaty for a protective reservation with respect to the right to barter and sell fish. There is no evidence in the transcript of the negotiations showing that it was ever discussed. To find such a reservation within the terms of Article 3 of the treaty involved would, it is earnestly submitted, rewrite the treaty and expand it beyond its clear terms. In Winans v. United States, cited supra, this Court stated that the right reserved was that of taking fish, and such further easements in the land as would enable such right to be exercised. This would appear to be a clear statement as to the limit which the treaty may be expanded.

In conclusion, it is respectfully submitted:

(a) That the decision of the Oregon Supreme Court is not in conflict with any of the decisions of this

Court heretofore made, as the decisions relied upon by the Petitioner dealt only with actual fishing activity and not the bartering, selling and processing of fish.

(b) The Supreme Court of the State of Oregon, in its decision, did not give the Yakima Treaty of June 9, 1855 a narrow construction, but followed a well-recognized and sound principle of treaty construction; that while the rule of liberal construction in favor of the Indians obtains, the courts cannot disregard the obvious meaning of the terms used.

(c) That there is no basis for the implied grant of the rights contended for by the Petitioner, because there is no competent evidence in the record that the Indians ever understood that such rights were being reserved.

(d) That the rights contended for by the Petitioner should not be granted by implication, for the effect of doing so is to hold that the right to fish involves all acts incident to the use and processing of fish, such as the barter and sale, processing and canning. And to hold that the processing and canning, and bartering and selling of fish is a part of the act of fishing and within the protective provisions of the treaty itself, would permit the Petitioner to erect canneries, retail and wholesale markets upon the Respondent's prop-

erty and eventually, perhaps, exclude the Respondent from his property, all of which was wholly unintended at the time of the making of the treaty.

Dated this 27th day of March, 1952.

T. LELAND BROWN
SAM VAN VACTOR

T. Leland Brown

By T. LELAND BROWN

Attorneys for Respondent.
Pioneer Bldg., The Dalles, Ore.